

Facts

Following the Military Judge's dismissal of charges against Appellee on 4 June 2007, and denial of the Appellant's Motion for Reconsideration, Appellant instituted this appeal pursuant to R.M.C. 908. Captain John W. Rolph, Judge Advocate General's Corps, United States Navy, was named "Deputy Chief Judge" by the Deputy Secretary of Defense on 11 June 2007.² He designated himself as a member of the panel assigned to hear this case.

Captain Rolph serves as the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, and so served prior to his ostensible appointment as Deputy Chief Judge of this Court. Before his service as an appellate judge, Captain Rolph served as a Navy trial judge. Upon information and belief, Captain Rolph, while a trial judge in Norfolk, Virginia, consulted with the Office of the Chief Prosecutor, Office of Military Commissions, beginning in or about January, 2003, regarding the establishment of military commissions under the President's Military Order ("PMO") authorizing trial by military commission for suspected members of Al-Qaeda, *see* 66 Fed. Reg. 57833 (Nov. 16, 2001), and Military Commission Order Number 1 ("MCO No. 1"). Upon information and belief, his participation included reviewing drafts of the proposed "trial guide" (i.e., script of "how things will unfold during commission sessions") for military commission proceedings at the request of military commission prosecutors. (*See* Attachment A.) Such activities would have necessarily included communications with attorneys representing the United States (a party to this case) in connection with military commission proceedings. Military commissions convened under the authority of the PMO and MCO No. 1 were ultimately held to be "illegal" by the United States Supreme Court in *Hamdan*, in that they

² The validity of Captain Rolph's appointment is the subject of a separate Motion to Abate Proceedings, filed with the Court on 19 July 2007.

violated the Uniform Code of Military Justice and “Common Article 3” of the 1949 Geneva Conventions. *See Hamdan*, 126 S. Ct. at 2798.

Argument

The Court should order production of unredacted copies of the IG Report materials in order to provide the parties with information necessary to determine whether a basis exists to challenge Captain Rolph’s participation as a judge in this case.

Appellee does not assert that there was anything improper or unlawful about Captain Rolph’s communications with military commission prosecutors in 2003, nor does Appellee dispute the IG Report’s finding that nothing in the relationship “crossed the line.” Captain Rolph was not then serving as a “presiding officer” in the military commission system, nor was he ever detailed as such. However, now that Captain Rolph has been appointed to serve as a judge on the Court of Military Commission Review, these communications take on added significance. If they occurred, they constitute communications between a judge of this Court and lawyers representing a party to proceedings therein. As a result, disclosure of the unredacted IG Report could provide a basis for challenging his participation as a judge in these proceedings, and/or further discovery relating to the nature and extent of contacts between Captain Rolph and attorneys representing the United States in connection with military commissions. The unredacted documents are already within the possession and control of the United States; disclosure to the defense is necessary to ensure that the defense is not at an unfair disadvantage in ascertaining whether a basis for challenge or recusal exists. Additionally, failure to produce unredacted copies of these documents creates an appearance problem that, depending on their content, those unredacted copies might dissipate.

A motion to compel production of a document is a well-established procedure in military appellate practice. *See, e.g., United States v. Rodriguez-Rivera*, 61 M.J. 148 (C.A.A.F. 2005) (order); *United States v. Kensey*, 36 M.J. 73 (C.M.A. 1992); *United States v. Curtis*, 30 M.J. 22 (C.M.A. 1990); *United States v. Gatlin*, 60 M.J. 804, 806 (N-M. Ct. Crim. App. 2004). Production of unredacted copies of the relevant portions of the IG Report is essential to resolution of the question of whether Captain Rolph consulted with military commission prosecutors and the content of any such communications, which in turn affects whether a basis for challenge or recusal exists with respect to him. Absent complete disclosure, it will be impossible for the parties to have “a fair opportunity to explore the impact” of the communications and to develop an appropriate record for review. *See United States v. Martinez*, 40 M.J. 82, 83 (C.M.A. 1994). Accordingly, the Court should compel Appellant to produce unredacted copies of the aforementioned documents.

Conclusion

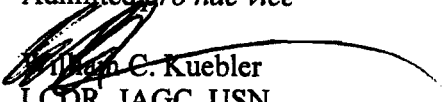
For the foregoing reasons, Appellee respectfully requests the Court to order production of (1) an unredacted version of paragraph 28 of the IG Report, and (2) Exhibit 27 to the IG Report.

Respectfully submitted,

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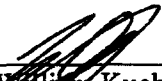
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ATTACHMENT

A) Excerpted Report of Investigation, dated 30 April 2004

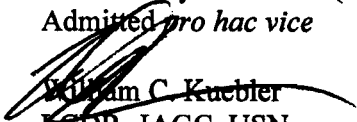
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 6 August 2007.



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I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 6 August 2007.



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DEFENSE CRIMINAL INVESTIGATIVE SERVICE
MID-ATLANTIC FIELD OFFICE
1111 JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22202

REPORT OF INVESTIGATION

██████████ 29-MAR-2004-60DC-Z1/U

April 30, 2004

PROJECT: MILCOM

DISTRIBUTION

DoD Inspector General (Joseph E. Schmitz)
DoD General Counsel (William J. Haynes II)
DoD Deputy Inspector General for Investigations (Richard T. Race)
Director, DCIS (Charles W. Beardall)
Office of the Military Commission (MG John D. Altenburg, Jr.)

(b)(2)

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28. [REDACTED] USN, [REDACTED] Norfolk, VA, described his relationship with three members of the OCP, OMC: [REDACTED] and [REDACTED] related that contacts between [REDACTED] and [REDACTED] have been minimal and contact with [REDACTED] has been especially limited. [REDACTED] referred that sometime around January 2003, [REDACTED] contacted him relative to "chopping" the proposed OMC trial guide. The trial guide contains the procedures to be utilized during military commissions. It consists of a "script" of how things will unfold during commission sessions. This guide does not contain any legal determinations or decisions regarding legal issues. To date, he has done two "chops" on this legal guide. The first was at the request of the [REDACTED] of the U.S. Army. The second was at the request of [REDACTED]. [REDACTED] stated that [REDACTED] has never discussed legal issues with him, and that [REDACTED] "knows better." There have been no discussions relative to legal issues involving pending commissions. [REDACTED] related that [REDACTED] calls him once every two months or so in order to provide general status updates as to what may happen with regard to commissions. Both [REDACTED] and [REDACTED] were aware of the fact that [REDACTED] had been nominated to serve as a [REDACTED] (although [REDACTED] has yet to be formally selected). [REDACTED] called [REDACTED] as a courtesy. There were no discussions of legal issues during these conversations. [REDACTED] advised that he has been a trial judge for seven years and an appellate judge for two years. He is very familiar with the rules of professional conduct and ethics that govern judges and attorneys. Absolutely nothing relating to his relationship with [REDACTED] and [REDACTED] has come close to "crossing the line." He has had similar contacts with OMC's Office of Chief Defense Counsel. Exhibit 27 sets forth details of the [REDACTED] interview.
29. [REDACTED] USMC, Arlington, VA, was interviewed regarding his knowledge of alleged criminal wrongdoing or ethical misconduct in the OCP. [REDACTED] reported to the OCP on October 1, 2003, as the [REDACTED] [REDACTED] advised he was not aware of any criminal or ethical misconduct within the OCP to include destruction of evidence. [REDACTED] advised that while at GTMO during the December 2003 timeframe, he came across information on a computer relative to tapes of interviews of detainees in GTMO. He advised that he sent an e-mail to GTMO regarding this issue, and [REDACTED] handled the issue after that. [REDACTED] advised they were later told that by GTMO that they did not have the tapes. Exhibit 28 sets forth details of the [REDACTED] interview.
30. [REDACTED] [REDACTED] was interviewed in her office. [REDACTED] [REDACTED] could not recall when the mock trial occurred. Mr. Haynes, General Counsel, DoD, and/or Mr. Cobb asked [REDACTED] to be involved in the mock trial put on by the OCP to in

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ATTACHMENT A

DAVID R. FRANCIS
Judge

IN THE COURT OF MILITARY
COMMISSION REVIEW

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali,”
Appellee

APPELLANT’S RESPONSE TO
MOTION TO COMPEL

CASE No. 07-001

Tried at Guantanamo Bay, Cuba on
4 June 2007
Before a Military Commission
Convened by MCCO # 07-02

Presiding Military Judge
Colonel Peter E. Brownback III

Relief Sought

The Government (“Appellant”) respectfully submits the documents referenced in the Appellee’s Motion to Compel Production of Documents of 6 August 2007. Today, 9 August 2007, Appellant forwarded, under seal, the following documents to the Court *ex parte*:

- A. Unredacted copy of paragraph 28 of the Inspector General’s Report of Investigation, dated 30 April 2004 (“IG Report”).
- B. Unredacted copy of Exhibit 27 to the IG Report.

These documents remain “For Official Use Only” and may not be disseminated outside or beyond the parties of this case without the prior approval of the classifying agency.

These documents satisfy Appellee's motion to compel production of documents.



Keith A. Petty
CPT, U.S. Army
Prosecutor
Office of Military Commissions
1851 S. Bell St., Suite 532
Arlington, VA 22202



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DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 9th day of August 2007.

A handwritten signature in black ink, appearing to read 'Keith A. Petty', with a long horizontal stroke extending to the right.

Keith A. Petty
CPT, U.S. Army
Prosecutor
Office of Military Commissions

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

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CMCR CASE NO. 07-001

MILITARY COMMISSION

***RULING ON MOTION TO
DISCLOSE, MOTION TO SEAL***

DATE: 13 AUGUST 2007

This order responds to the Defense Motion for Release of Department of Defense Inspector General (DoD IG) Records filed with this Court on August 6, 2007.

1. Appellant requests release of an unredacted copy of paragraph 28 of the DoD IG Report of Investigation, dated April 30, 2004, as well as an unredacted copy of Exhibit 27 to the DoD IG Report (referenced therein).
2. Appellee objects to release of the records requested in paragraph 1.
3. Appellee has no objection to Appellant's review of the requested records at the office of Captain Petty. Appellee states the redacted information is "For Official Use Only" and requests that it not be released beyond the parties of this case without the prior approval of the classifying agency.

The Court therefore **ORDERS**:

1. Appellant may review the requested records at the office of Captain Petty. The redacted information continues to be classified, "For Official Use Only" and may not be released beyond the parties of this case without the prior approval of the classifying agency.
2. A sealed copy of the unredacted records will be placed into the appellate record with a copy of this order attached to the exterior of the envelope containing the sealed records.

//Signed//

JOHN W. ROLPH
Judge

